Submission to the PJCIS Review of the Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023

I thank the Committee for the opportunity to make a submission in relation to this review.

I am a private citizen who has never been a member of the ADF or worked for the Department of Defence, however as a long-term Canberra resident I know many people who would potentially be impacted by this bill.

The overall intention of this bill - preventing foreign powers whose interests are not aligned with ours from benefiting from Australian military expertise - is entirely sensible. In light of recent cases of Australians working for hostile foreign militaries, measures must be taken to address this issue. Existing offences may not be suitable due to the difficulties in obtaining evidence of specific acts undertaken in the course of such work. However, the bill in its present form is problematic. My issues with the bill are:

- **Excessive scope:**
    - There is no requirement that a restricted individual's work have any demonstrable potential to cause harm to Australia's national security. A restricted individual may, on a layperson's plain English reading of the legislation, require an authorisation in order to volunteer as a parent at a public school, or to read books to children at a council-owned local library.
    - The application of restrictions to employment with public enterprises, while clearly justifiable in the case of certain enterprises that are defence-related, means that the restrictions apply to companies that employees may not even be aware are connected to foreign governments.
    - It isn't clear to the layperson how the restrictions might apply to employment with companies that are service providers to foreign governments. For example, most multinational IT services companies have a number of foreign government customers among a broad customer base that includes both government and private sector clients. Does a restricted individual need an authorisation if they are employed as a technical support engineer with responsibility for handling support tickets from a wide variety of customers, a small percentage of which may sometimes be from foreign government customers?
    - While these extreme examples may not necessarily breach s 115A, and even if they technically did, the risk of prosecution would be extremely low, even the perception that the restrictions are excessive may cause problems.
    - The scope of s 115A should be reconsidered to make sure it is proportionate.
- **Excessive punishment:**
    - A maximum penalty of 20 years' imprisonment for violating s 115A is appropriate for work that has significant potential to harm national security,

but it's too harsh for merely working for a civilian government agency or public enterprise in a role that does not pose a clear risk to security.
    - Existing national security offences that carry sentences of 20 years or more generally require evidence of harm to Australia's national security interests. It would seem appropriate for offences that do not require this element to carry a more proportionate penalty.
    - The s 115A offence could easily be divided into multiple offences that impose a scale of penalties based on the nature of the work and the employer (without adding elements that make the offences too difficult to prove). For offences at the lowest end, where there is no evidence that the work has even a remote potential to cause harm to national security, a fine would be the appropriate sanction.
- **Excessive reliance on ministerial determinations:**
    - The Minister can change the classes of excluded individuals and the list of excluded countries at any time, with no notice and no grace period.
    - Given the significant obligations and penalties that this bill imposes on restricted individuals, it isn't appropriate for so much of the regulatory regime to be dependent on the Minister's discretion in making these determinations.
    - I note the comments of the Parliamentary Joint Committee on Human Rights in relation to this issue.
- **Affected employees may not know they're affected:**
    - The bill contains no requirement for restricted individuals to be personally notified of their restricted individual status.
    - There are potentially (depending on the exemptions that the Minister approves) many thousands of former staff who could be impacted by this bill as soon as it comes into force.
    - While it is obviously not possible for the Department to contact every past employee, there should be some requirements to ensure that restricted individuals are proactively informed of changes to the rules as much as is practicable.
    - A pathway must exist for those who have inadvertently violated the rules in a minor way to regularise their situation without risking prosecution. In the event that a restricted individual discovers that they have inadvertently broken (for example, taking an entirely innocuous administrative job with a overseas company which they did not realise was a public enterprise), an overly broad offence provision with an overly harsh penalty is likely to deter them from requesting an authorisation, as to do so would involve admitting to the physical elements of an extremely serious offence.
- **Impact on staffing:**
    - The Australian Public Service already struggles to hire technical talent in many areas, with many highly-qualified specialists dissuaded by uncompetitive salaries and poor career development prospects.
    - Defence and intelligence agencies face further challenges, in large part due to the notoriously slow security clearance process, and the additional burdens of holding a clearance and complying with security guidance.
    - Imposing further security obligations, which could potentially last for a lifetime, and that may limit future career opportunities, must therefore be done with the

utmost care to avoid negative impacts on both retaining the existing workforce and recruiting new staff.
    - The foreign work restrictions in this bill don't apply to people who do work for Defence through external contracting or consultancy firms. Current Government policy is to reduce the APS's reliance on contractors and consultants. This bill provides a further incentive for workers to seek contractor employment rather than APS employment.
- **Impact on staff from migrant backgrounds:**
    - By its nature, this bill is disproportionately likely to impact APS and ADF staff from migrant backgrounds who maintain ties to other countries and may wish to pursue careers in those countries later in life (this fact alone, of course, does not automatically reflect poorly on their loyalty to Australia).
    - The Government must be conscious of the key skills that migrants bring to the public sector, including linguistic and cultural skills that are vital to Australia's defence and diplomatic relationships in Asia and the Pacific, and must take care not to dissuade migrants from joining the Defence workforce.

I believe the national security outcomes that this bill seeks can be achieved with a more careful approach that doesn't unfairly burden our Defence personnel and doesn't have the potential to harm defence capability.

The Government should consult openly with Defence personnel, and relevant trade unions such as the CPSU, Professionals Australia and AMWU, before proceeding further with this bill.

The Government should also seriously consider the comments of the Parliamentary Joint Committee on Human Rights and the Senate Standing Committee for the Scrutiny of Bills, and the other submissions to this inquiry.